absolute judicial immunity was inappropriate. *Forrester, supra*. Similarly, a prosecutor's act of giving legal advice to police officers was held not to be intimately associated with the judicial phase and thus not within the protection of immunity. *Burns v. Reed*, 500 U.S. 478, 111 S. Ct. 1934, 114 L. Ed. 2d 547 (1991). On the other hand, a prosecutor's appearance before a judge at a probable cause hearing to present evidence in support of a motion for a search warrant is an act within the scope of absolute immunity. *Id.*, 500 U.S. at 491, 111 S. Ct. at 1942. The professional evaluation of the evidence assembled by the police is protected by absolute prosecutorial immunity. *Buckley, supra*, 509 U.S. at 273, 113 S. Ct. at 2615. The evaluation of witnesses is also a prosecutorial function to which immunity applies. *Roe v. City and County of San Francisco*, 109 F.3d 578, 584 (9th Cir. 1997). *See also Harrington v. Almy*, 977 F.2d 37 (1st Cir. 1992), cited favorably in *Roe*. It is not necessary that these prosecutorial acts occur within the courtroom. This court has noted that "the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom . . ." *Imbler, supra*, 424 U.S. at 431, n.33, 96 S. Ct., at 995, n.33. Thus the Ninth Circuit in *Roe* was able to hold that a prosecutor's decision not to prosecute cases investigated by a certain officer was within his prosecutorial function although the decision was not related to a particular case but rather was a blanket decision. *Roe, supra*, 109 F.3d at 583.

This function analysis looks to the role of the prosecutor (or judge) rather than to his motives. *See, e.g., Butz v. Economou*, 438 U.S. 478, 493, 98 S. Ct. 2894, 2904, 57 L. Ed. 2d 895 (1978): "[A] malicious intent will not subject a public officer to liability for performing his

authorized duties as to which he would otherwise not be subject to damages liability." *See also Cleavinger v. Saxner*, 474 U.S. 193, 200, 106 S. Ct. 496, 500, 88 L. Ed. 2d 507 (1985), quoting *Bradley v. Fisher*, 13 Wall. 335, 347, 20 L. Ed. 646 (1872): "'Nor can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed.'" *Also see Imbler, supra*, 424 U.S. at 427, 96 S. Ct. at 993: "To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty."

The lower courts, too, have recognized the fact that the absolute immunity analysis does not take a prosecutor's motives into consideration. *See, e.g., Bernard v. County of Suffolk*, 356 F.3d 495, 503 (2d Cir. 2004): "[O]nce a court determines that challenged conduct involves a function covered by absolute immunity, the actor is shielded from liability for damages regardless of the wrongfulness of his motive . . ." *Also see Ashelman v. Pope*, 793 F.2d 1072, 1078 (9th Cir. 1986) (en banc): "Intent should play no role in the immunity analysis."

The panel in the instant case made a superficial attempt to adhere to the function analysis, concluding that the actions of Gammick and Helzer were administrative rather than prosecutorial in nature. "When they involved themselves in the School Police Department's personnel decision whether to hire Botello, they were at best performing an administrative function and, as such, could only be entitled to qualified immunity." *Botello*, App. 10a. To arrive at this conclusion, however, the panel necessarily and improperly looked to the motives of Gammick and Helzer. The panel refers to the motives of these defendants throughout their opinion.

See, e.g., App. p. 4a, wherein the panel asserts that Botello "experienced immediate *retaliation* . . ." *See also* App. pp. 10a-11a, containing several references to petitioners' motives, including "trying to sabotage his job prospects," "[h]aving failed to thwart the . . . hiring," and "attempted to have him fired." The following quote from the panel decision, App. p. 9a (emphasis added), is particularly revealing: "The central issue in determining whether Gammick and Helzer are entitled to absolute immunity is defining the particular function they were engaged in *when they allegedly retaliated* against Botello." Thus the panel has directly tied the function analysis to the alleged retaliatory motive of petitioners.

The panel acknowledged that Gammick and Helzer were entitled to absolute immunity for making the decision not to prosecute cases investigated by Botello. App. p. 11a. Moreover, the panel acknowledged that the *communication* of that decision to the police chief was also entitled to absolute immunity. App. p. 11a. These two holdings, taken together, should have resulted in the affirmance of the district court's dismissal of this lawsuit. The decision to reject an investigator's cases, justified or not, goes to the professional evaluation of evidence and of witnesses, both of which are clearly within the scope of the prosecutorial function. However, by looking to the alleged motives of the prosecutors, the panel erroneously transformed this clearly prosecutorial function into an administrative function. *See, e.g.*, App. p. 10a:

> Their defamatory comments about Botello were simply an attempt to disrupt an employment decision. Thus, Gammick and Helzer are not

> entitled to absolute immunity for their communications with the School Police Department regarding its hiring of Botello.

As can be seen, the professional evaluation of Botello's credibility as a witness and as an investigator gathering evidence for presentation in a criminal case was held by the panel to have been transformed into an administrative personnel decision based on the alleged motive of the petitioners to disrupt Botello's employment. The panel's opinion utilized the terminology of the function analysis, but clearly relied on the improper element of motive to arrive at its erroneous conclusion.

Time and again this court has stated that the immunity analysis looks to the function performed and not to the identity of the prosecutor or to his motives. The panel has therefore decided an important federal question in a way that conflicts with numerous relevant decisions of this court. Furthermore, the panel's opinion is a reported decision that will create confusion among the circuits and will be controlling within the Ninth Circuit. The issue of the role of motive in the immunity analysis is an important one having major significance to prosecutors throughout the Ninth Circuit and the rest of the country. Petitioners therefore respectfully request the court to grant this petition for certiorari in order to review and correct the panel's opinion.

II.

THE PANEL HAS IMPROPERLY CONVERTED A PROSECUTORIAL FUNCTION TO AN ADMINISTRATIVE FUNCTION BY LOOKING TO THE EFFECT OF THE PROSECUTOR'S DECISION

The panel also held that the decision to refuse cases investigated by Botello was not intimately tied to the judicial process because of the effect of the decision, which was the removal of Botello from any aspect of the investigative process, "even from the earliest stages of preliminary investigations . . ." App. p. 11a. The panel reasoned that this blanket refusal to take cases, no matter how limited Botello's participation and no matter the availability of other corroborating witnesses or evidence, had the effect of causing the decision to become a "staffing directive[] . . ." (App. 11a), placing Gammick and Helzer in the police chief's shoes in making hiring and firing decisions. App. pp. 12a-13a.

The panel's result-oriented approach is antagonistic to the function analysis, which holds that a prosecutor is entitled to absolute immunity for prosecutorial functions no matter the consequences of his actions. *See, e.g., Imbler, supra,* 424 U.S. at 427, 96 S. Ct. at 993:

> To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty.

In *Stump v. Sparkman*, 435 U.S. 349, 363, 98 S. Ct. 1099, 1108, 55 L. Ed. 2d 331 (1978), this court rejected petitioner's

request to consider the results of a judge's judicial decision in evaluating absolute immunity:

> Both the Court of Appeals and the respondents seem to suggest that, because of the tragic consequences of Judge Stump's actions, he should not be immune. . . . Disagreement with the action taken by the judge, however, does not justify depriving that judge of his immunity. Despite the unfairness to litigants that sometimes results, the doctrine of judicial immunity is thought to be in the best interests of "the proper administration of justice . . . [, for it allows] a judicial officer, in exercising the authority vested in him [to] be free to act upon his own convictions, without apprehension of personal consequences to himself."

Had the panel looked to the nature of the function performed rather than to the effect of the decision, it necessarily must have concluded that Gammick and Helzer were afforded absolute immunity. The refusal to prosecute an investigator's cases remains a prosecutorial decision no matter the "stage" of an investigation. This is because the decision goes to the evaluation of the strength and credibility of witnesses and evidence, matters which are clearly within the scope of the prosecutorial function. *Buckley*, *supra*, 509 U.S. at 272-73, 113 S. Ct. at 2615.

The panel's focus on the "stages" of an investigation fails to provide an analytical framework to determine the stage at which a decision to reject an investigator's cases is transformed from an administrative decision to a prosecutorial decision. The panel does not provide guidance

to allow future prosecutors to know at what preliminary stages a tainted investigator's participation in an investigation will be harmless to the prosecution. Indeed, it is unclear that there are in fact discrete "stages" to an investigation. The panel's discussion of these stages is based upon a fundamental misinterpretation of *Burns*, *supra*, cited by the panel to refute the contention that immunity for the decision to reject Botello's cases extends to all stages of an investigation. *See* App. 11a-12a. The quoted language from *Burns*, however, goes to the function analysis rather than to some arbitrary moment in time when administrative functions are converted to prosecutorial functions:

> Almost any action by a prosecutor, *including his or her direct participation in purely investigative activity*, could be said to be in some way related to the ultimate decision whether to prosecute, but we have never indicated that absolute immunity is that expansive. Rather, as in *Imbler*, we inquire whether the prosecutor's actions are closely associated with the judicial process.

Burns, *supra*, 500 U.S. at 495, 111 S. Ct. at 1944 (emphasis added).

The emphasized portion of the quote above was omitted from the panel's quote at App. p. 11a, because it is at odds with the facts in the instant case. Gammick and Helzer did not directly participate in a purely investigative activity. They merely made the decision not to accept cases investigated in whole or in part by Botello, which was clearly prosecutorial in nature since the immunity analysis goes to the function at issue, not to a particular moment in time. "We recognize that the duties of the prosecutor in his role as

advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom." *Imbler*, *supra*, 424 U.S. at 431, n.33, 96 S. Ct. at 995, n.33.

The panel's decision is arbitrary and in clear conflict with numerous relevant decisions of this court. This issue of the application of the function analysis is of great importance to prosecutors throughout the country, and particularly to prosecutors within the Ninth Circuit, whose prosecutorial judgments will now be chilled out of concern over the effects of the exercise of such judgments. The court therefore is respectfully requested to grant certiorari to review and correct the panel's opinion.

III.

THE PANEL FAILED TO LOOK TO STATE LAW TO DETERMINE WHETHER GAMMICK AND HELZER WERE POLICYMAKERS FOR THE STATE OF NEVADA OR FOR WASHOE COUNTY IN REFUSING TO PROSECUTE BOTELLO'S CASES

The District Attorney is not a policymaker for Washoe County when acting as a prosecutor. This is the unambiguous law of the State of Nevada. The panel recognized its obligation to look to state law to determine this question: "We determine whether an officer is a state or a county official by looking to state law to determine whether the particular acts the official is alleged to have committed fall within the range of the official's state or county functions." App. p. 14a, citing *Weiner v. San Diego County*, 210 F.3d 1025, 1028-29 (9th Cir. 2000). After making this statement,

the panel proceeded to determine that the District Attorney was a policymaker for the county with respect to criminal prosecutions without looking to state law. The panel sidestepped its obligation to look to state law by merely referencing *Webb v. Sloan*, 330 F.3d 1158, 1164 (9th Cir. 2003), a decision in which the issue was not litigated. In *Webb*, the question whether prosecutors were policymakers for the county rather than for the state was simply assumed by the court and the parties without analysis. Rather, the disputed issue in *Webb* was whether *deputy* district attorneys, as opposed to district attorneys, were policymakers for their respective counties. *Webb* held that they were. A change in Nevada law occurred after this case was submitted to the panel below for decision, clarifying this issue by stating explicitly that deputy district attorneys are not policymakers for their respective counties. The law, AB 477, became effective on May 31, 2005. Section 6 of AB 477 states, in pertinent part:

> The appointment of a deputy district attorney must not be construed to confer upon that deputy policymaking authority for the office of the district attorney or the county by which the deputy district attorney is employed.

Webb therefore has been effectively overturned by legislation. This change in state law was brought to the Ninth Circuit's attention in petitioners' petition for rehearing en banc, but was not addressed by the court.

This court has held that it is necessary to examine the particular acts in question to determine whether the district attorney is a policymaker for the county or for the state. *McMillian v. Monroe County Alabama*, 520 U.S. 781, 785,

117 S. Ct. 1734, 1737, 138 L. Ed. 2d 1 (1997). In erroneously relying upon the *Webb* decision, the panel failed to analyze or even discuss the following items of Nevada law, all of which make clear that a district attorney acts as a policymaker for the State of Nevada, not for a county, when acting as a prosecutor. It is the district attorney who files informations in criminal prosecutions. NRS 173.045(1). The district attorney is to draw all indictments when required by the grand jury. NRS 252.110(1). Criminal actions are "prosecuted in the name of the State of Nevada, as plaintiff." NRS 169.055. This statute derives from the Nevada Constitution, which settles the matter regarding the authority under which the district attorney acts in prosecuting individuals: "The style of all process shall be 'The State of Nevada' and all prosecutions shall be conducted in the name *and by the authority of* the same." Constitution of the State of Nevada, Art. 6, § 13 (emphasis added). Thus, the district attorney prosecutes criminal cases in the name of and under the authority of the State of Nevada, not Washoe County. Counties are not delegated any authority over district attorneys regarding the prosecution of criminal cases. See, generally, NRS Chapter 244 regarding county government. To the contrary, the Nevada Supreme Court has stated that the decision whether to prosecute cases is within the discretion of the district attorney. *See Cairns v. Sheriff*, 89 Nev. 113, 115, 508 P.2d 1015 (1973): "The matter of the prosecution of any criminal case is within the entire control of the district attorney, NRS 173.045, NRS 252.110."

The panel overlooked *McMillian* and the Nevada law recited above in coming to the erroneous conclusion that the district attorney is the policymaker for Washoe County on prosecutorial questions. It would be incongruous to hold Washoe County liable for a district attorney's decisions over which the county had no control. The panel decision not only conflicts with the decision of this court in *McMillian*, but has wrongly decided an important issue of state law affecting all prosecutors throughout the State of Nevada. The panel has simply decreed that prosecutors are policymakers for their counties rather than for the state when this is not so as a matter of state law. If allowed to stand, this decision will cause great harm by allowing § 1983 claims to be brought against counties for prosecutorial decisions over which the counties had no control and for which the prosecutors are immune from liability. Petitioners therefore respectfully request that the court grant certiorari to review and correct the panel's opinion.

CONCLUSION

The court of appeals panel has handed down a reported decision that will have a tremendous impact on the ability of prosecutors to exercise their judgment regarding the credibility and veracity of criminal investigators. The decision presents questions of extreme importance throughout the country since it leaves prosecutors at risk of liability for the exercise of their prosecutorial discretion and counties at risk of liability for decisions beyond their control. The panel's decision is in clear conflict with numerous decisions of this court on the subjects of absolute immunity and municipal liability. Petitioners therefore respectfully request that the court grant their petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JUNE 23, 2005

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03-16618

D.C. No. CV-03-0019-RLH/VPC

RENE BOTELLO,

Plaintiff-Appellant,

v.

RICHARD GAMMICK; JOHN HELZER; WASHOE COUNTY,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Nevada
Roger L. Hunt, District Judge, Presiding

Argued and Submitted
March 16, 2005—Berkeley, California

Filed June 23, 2005

Before: John T. Noonan, Jr., Sidney R. Thomas and Raymond C. Fisher, Circuit Judges.

Opinion by Judge Fisher

Appendix A

OPINION

FISHER, Circuit Judge:

Appellant Rene Botello alleges that after he brought to light abuses in the Washoe County District Attorney's sexual assault response program, Washoe County District Attorney Richard Gammick and Deputy District Attorney John Helzer (the "prosecutors") retaliated against him for his protected First Amendment activity, in violation of 42 U.S.C. § 1983, defamed him and subjected him to intentional infliction of emotional distress. Botello brought suit in the district court against Gammick, Helzer and Washoe County ("County"). The district court dismissed Botello's first amended complaint on the basis of absolute prosecutorial immunity, and this appeal followed. Because certain of the prosecutors' acts were not within the scope of their prosecutorial functions and were not closely associated with the judicial process, they were not shielded by absolute immunity. In addition, the County was not entitled to absolute immunity. Accordingly, we affirm in part, reverse in part and remand.

I. Background

We take the following facts from Botello's first amendment complaint.[1] In December 2001, Botello was employed by the Washoe County Sheriff's Office ("WCSO") as a child sexual assault investigator. Botello was one of the few Spanish-speaking investigators in the County and was

1. Because the district court granted a Rule 12(b)(6) dismissal, we accept the facts as alleged by Botello.

frequently called upon by fellow workers and outside police departments to assist in investigating cases involving Spanish-speaking victims, suspects and witnesses. In the course of his duties, he learned that Nurse Lily Clarkson, who regularly testified as a medical expert in child sexual assault cases, was "indisputably wrong" in her medical finding that a certain female child had been sexually penetrated, had no hymen and was the clear victim of sexual abuse.[2] In addition, Botello learned that Clarkson was equally mistaken in her separate conclusion that the child's sister was similarly injured.

In separate follow-up examinations of the sisters, three pediatricians at three different medical facilities found that there was no physical evidence to support Clarkson's findings that the children had been sexually assaulted. The doctors who performed these follow-up examinations informed Botello that Clarkson's medical findings were in "gross error." Given Botello's awareness that suspects were routinely arrested based on Clarkson's findings and convicted as a result of her testimony, his discovery that her findings were in "gross error" deeply disturbed him.

Botello reluctantly concluded that it would be wrong for him to remain silent and that he needed to bring evidence of Clarkson's wrongful medical findings to the appropriate officials. He brought his discovery to the attention of his superiors, including County prosecutors Gammick and

2. Clarkson was one of two nurses employed by the Child Abuse Response and Evaluation program ("CARES"), a state program administered by the Washoe County District Attorney's Office ("DA's Office").

Helzer, who regularly utilized Clarkson's testimony in procuring sexual assault convictions. Botello also requested an audit of the CARES program to ensure the integrity of County sexual assault investigations and prosecutions.

In response to Botello's disclosures, the prosecutors became angry, accused Botello of not being a "team player" and warned him to keep his mouth shut about Clarkson's testimony. Gammick and Helzer threatened to retaliate against Botello should he continue to advocate for oversight of the CARES program. Alarmed by their unexpected response, Botello reported his concerns about the CARES program and his further concerns about a possible cover-up and retaliation by the DA's Office to the Nevada Attorney General's Office and the Federal Bureau of Investigation. Concurrently, Botello resigned his position with the WCSO and applied for employment with the Washoe County School District Police Department ("School Police Department").

Botello experienced immediate retaliation from Gammick and Helzer. Unaware that Botello had already secured his new job with the School Police Department, Gammick and Helzer telephoned his new employer in an effort to dissuade it from hiring Botello. During the telephone conversation, Gammick and Helzer made false allegations about Botello's character and performance at his previous job at WCSO. Failing in their efforts to prevent Botello from being hired, they attempted through follow-up communications to have him fired.

In oral and written communications to the School Police Department, they insisted that Botello must not be permitted

to participate in any investigations. Gammick and Helzer emphasized that the DA's Office would refuse to file any case where Botello participated in any phase of the investigation, no matter how preliminary and no matter whether other investigators were available to testify. Because of their threats, Botello's employer assigned him to desk duty.

On June 3, 2003, Botello filed a first amended complaint, alleging violation of his First Amendment rights under 42 U.S.C. § 1983, and defamation and intentional infliction of emotional distress under Nevada law. The defendants moved to dismiss the first amended complaint on the grounds of absolute immunity. The district court granted defendants' motion to dismiss Botello's § 1983 claim pursuant to Fed. R. Civ. P. 12(b)(6), and dismissed Botello's supplemental state law claims without prejudice pursuant to 28 U.S.C. § 1367.[3]

II. Analysis

We have jurisdiction under 28 U.S.C. § 1291. A dismissal under Rule 12(b)(6) for failure to state a claim is reviewed de novo. *Milstein v. Cooley*, 257 F.3d 1004, 1007 (9th Cir.2001). The factual allegations in the complaint are

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3. In Botello's opening brief he augmented the factual background of the case by detailing what occurred after the district court dismissed his suit: less than one month after the district court dismissed his case, Botello was fired from his job; subsequent to his termination, the School Police Department offered Botello a position as a truancy officer, which pays approximately half the salary of Botello's prior position. The defendants have neither objected to nor disputed Botello's additional factual assertions.

assumed to be true. *Id.* We review a decision by a district court to afford a public official or a municipality absolute or qualified immunity de novo. *Webb v. Sloan*, 330 F.3d 1158, 1163 n. 4 (9th Cir.2003) (municipality); *Herb Hallman Chevrolet v. Nash-Holmes*, 169 F.3d 636, 642 (9th Cir.1999) (public official).

In this case we are called upon to examine the scope of our decision in *Roe v. City & County of San Francisco*, 109 F.3d 578 (9th Cir.1997), which held that prosecutors were entitled to absolute immunity for refusing to prosecute any cases referred by a particular officer absent additional corroborating evidence or testimony. The issues before us on appeal are: (1) whether all of Gammick's and Helzer's conduct fell within their decision not to prosecute Botello's cases and whether this fact entitles them to absolute immunity; and (2) whether the County is entitled to absolute immunity.[4] The district court found that even assuming the facts alleged in Botello's complaint were true—the prosecutors attempted to dissuade the School Police Department from hiring Botello and insisted that Botello be barred from all investigations in retaliation for Botello's

4. The only issue before the district court on defendants' motion to dismiss was whether the defendants were entitled to absolute immunity. Because absolute immunity acts as a total bar against suit, the district court did not consider whether Botello's speech was protected by the First Amendment. *See, e.g., Milstein*, 257 F.3d at 1007-08 ("To be sure, [absolute] immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty.") (internal quotation marks and citations omitted). We therefore confine our discussion to the nature of the defendants' conduct and not the nature of Botello's speech.

exercise of his First Amendment rights—the prosecutors were entitled to absolute immunity. We disagree. In characterizing all of the prosecutors' alleged behavior as falling within their decision not to prosecute Botello's cases, the district court construed Gammick's and Helzer's conduct too narrowly and read *Roe* too broadly.

A. Absolute Prosecutorial Immunity

Prosecutors are absolutely immune from liability under § 1983 for their conduct insofar as it is "intimately associated" with the judicial phase of the criminal process. *See Burns v. Reed*, 500 U.S. 478, 486, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976)); *Miller v. Gammie*, 335 F.3d 889, 897 (9th Cir.2003) (en banc) ("[T]o enjoy absolute immunity for a particular action, the official must be performing a duty functionally comparable to one for which officials were rendered immune at common law."). However, when prosecutors perform administrative or investigative functions, only qualified immunity is available. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 271-73, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993); *Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir.2003). That is, the actions of a prosecutor are not absolutely immune merely because they are performed by a prosecutor. *Buckley*, 509 U.S. at 273, 113 S.Ct. 2606.

To determine whether an action is judicial, administrative or investigative, the court looks at "the nature of the function performed, not the identity of the actor who performed it." *Kalina v. Fletcher*, 522 U.S. 118, 127, 118 S.Ct. 502, 139 L.Ed.2d 471 (1997) (quoting *Forrester v. White*, 484 U.S.

219, 229, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988)). Thus, whether a prosecutor benefits from absolute or qualified immunity depends on which of the prosecutor's actions are challenged. *See Morley v. Walker*, 175 F.3d 756, 759 (9th Cir.1999). The official seeking absolute immunity bears the burden of demonstrating that absolute immunity is justified for the function in question. *Buckley*, 509 U.S. at 269, 113 S.Ct. 2606; *Burns*, 500 U.S. at 486, 111 S.Ct. 1934. The presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the course of their duties. *Burns*, 500 U.S. at 486-87, 111 S.Ct. 1934.

Although the line between the functions is not entirely clear, it is clear that absolute prosecutorial immunity is justified "only for actions that are connected with the prosecutor's role in judicial proceedings, not for every litigation-inducing conduct." *Burns*, 500 U.S. at 494, 111 S.Ct. 1934. On the one hand, it is well established that a prosecutor has absolute immunity for the decision to prosecute a particular case, *see Burns*, 500 U.S. at 486, 111 S.Ct. 1934, and for the decision *not to prosecute* a particular case or group of cases, *see Roe*, 109 F.3d at 583. In addition, a prosecutor's professional evaluation of a witness is entitled to absolute immunity "even if that judgment is harsh, unfair or clouded by personal animus." *Id.* at 584.

On the other hand, it is also well established that an official is not entitled to absolute immunity for conduct involving termination, demotion and treatment of employees. *See Forrester*, 484 U.S. at 228-30, 108 S.Ct. 538 (holding that a judge is not entitled to absolute immunity in his capacity as an employer and therefore may be liable for

unconstitutional conduct involving the termination, demotion and treatment of employees); *Meek v. County of Riverside, 183 F.3d 962, 967 (9th Cir.1999)* (holding that a judge's decision to fire an employee was an administrative decision not entitled to absolute immunity). The Supreme Court has also held that prosecutors are not entitled to absolute immunity for advising police officers during the investigative phase of a criminal case, *see Burns*, 500 U.S. at 493, 111 S.Ct. 1934, performing acts which are generally considered functions of the police,[5] *see Buckley*, 509 U.S. at 274-76, 113 S.Ct. 2606, acting prior to having probable cause to arrest, *see id.* at 274, 113 S.Ct. 2606, or making statements to the public concerning criminal proceedings, *see id.* at 277-78, 113 S.Ct. 2606.

B. Functional Analysis

The central issue in determining whether Gammick and Helzer are entitled to absolute immunity is defining the particular function they were engaged in when they allegedly retaliated against Botello. The acts of Gammick and Helzer fit within three separate categories of conduct: (1) their communications to the School Police Department in an effort

5. Although we focus on the administrative nature of Gammick's and Helzer's conduct, by attempting to dictate the manner in which future investigations should be staffed and conducted, the prosecutors were likely engaging in an investigative rather than a judicial function. *Buckley*, 509 U.S. at 273, 113 S.Ct. 2606 ("When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.") (internal quotation marks omitted).

to dissuade it from hiring Botello; (2) their decision not to prosecute Botello's cases; and (3) their communications to the School Police Department insisting that Botello be barred from all stages of the investigative process.

1. Telephoning the School Police Department to Dissuade It from Hiring Botello

Botello claims that before they adopted their nonprosecution policy, the prosecutors first retaliated against him by telephoning the School Police Department trying to sabotage his job prospects. Gammick and Helzer are not entitled to absolute immunity for this conduct, which had no connection to the judicial process. When they involved themselves in the School Police Department's personnel decision whether to hire Botello, they were at best performing an administrative function and, as such, could only be entitled to qualified immunity. *See Forrester*, 484 U.S. at 228-30, 108 S.Ct. 538. Their defamatory comments about Botello were simply an attempt to disrupt an employment decision. Thus, Gammick and Helzer are not entitled to absolute immunity for their communications with the School Police Department regarding its hiring of Botello.[6]

2. Decision not to Prosecute

Having failed to thwart the School Police Department's hiring of Botello, Gammick and Helzer allegedly attempted to have him fired by announcing their refusal to prosecute any cases where Botello participated in any phase of the

6. We express no opinion as to whether the prosecutors' actions damaged Botello.

investigative process. The prosecutors' failure to offer an explanation for their nonprosecution policy and their refusal to prosecute Botello's cases under any circumstances, for instance even where there might be corroborating evidence or testimony, give us pause. Nonetheless, their decision not to prosecute Botello's cases and their communication of that decision is intimately tied to the judicial process and is thus entitled to absolute immunity. *See Roe*, 109 F.3d at 583; *cf. Beck v. Phillips*, 685 N.W.2d 637 (Iowa 2004) (holding that the prosecutor was entitled to absolute immunity for his nonprosecution policy but only qualified immunity for sending letters communicating the policy to city officials).

3. Barring Botello from All Stages of the Investigative Process

The prosecutors' demands that Botello be barred from participating *in any aspect of any investigation* were not intimately tied to the judicial process. Rather, in insisting that Botello be barred from any aspect of the investigative process, even from the earliest stages of preliminary investigations, Gammick and Helzer were in essence dictating to local law enforcement authorities how future criminal investigations should be conducted and staffed—an administrative function.

Although Gammick and Helzer argue that their staffing directives fall within *Roe's* protection, such a reading of *Roe* would extend absolute immunity to conduct well beyond the prosecutorial function. *See Burns*, 500 U.S. at 495, 111 S.Ct. 1934 ("Almost any action by a prosecutor . . . could be said to be in some way related to the ultimate decision whether

to prosecute, but we have never indicated that absolute immunity is that expansive. Rather, . . . we inquire whether the prosecutor's actions are closely associated with the judicial process."). Because the official seeking absolute immunity bears the burden of demonstrating that absolute immunity is justified for the function in question, *see Buckley*, 509 U.S. at 269, 113 S.Ct. 2606, it was the prosecutors' burden to demonstrate that their conduct was tied to an exercise of their prosecutorial judgment. Here, they failed to demonstrate a connection between their unexplained, unqualified blanket prohibition on Botello's involvement in any aspect of an investigation and the judicial process. Under Gammick's and Helzer's nonprosecution policy, it made no difference whether Botello was a potential witness, or whether his testimony could be corroborated by other witnesses or physical evidence. *Cf. Roe*, 109 F.3d at 584 (noting that prosecutors would not prosecute Roe's cases absent corroborating evidence or testimony).

Instead, Gammick and Helzer sought to usurp the staffing decisions Chief Meiras might make to use Botello in ways that would not compromise a criminal prosecution and would comport with the prosecutors' nonprosecution policy. In *Roe*, the police chief had a number of staffing choices in light of the prosecutors' qualified nonprosecution policy, including transferring Roe as the chief did, or making sure that there would always be an officer other than Roe who could testify or corroborate Roe's testimony. Gammick and Helzer gave Chief Meiras no such options. We fail to see why Gammick and Helzer should be entitled to absolute immunity when they stepped into the shoes of Chief Meiras, who would at most be entitled to only qualified immunity as an

administrative decision-maker. *See Burns*, 500 U.S. at 486-87, 111 S.Ct. 1934 (explaining that qualified rather than absolute immunity is presumed sufficient to protect government officials in the course of their duties).

Just as a prosecutor may not assert that his actions are absolutely immune merely because they are performed by a prosecutor, *see Buckley*, 509 U.S. at 273, 113 S.Ct. 2606, a prosecutor may not assert blanket absolute immunity by labeling all his actions as within a particular prosecutorial function. By simply characterizing all of their conduct as a decision not to prosecute, Gammick and Helzer have not met their burden of showing that absolute immunity is justified either for their attempted interference with the School Police Department's hiring of Botello or for their administrative demands that Botello be barred from participating in all stages of the investigative process. Accordingly, we reverse and remand to the district court to determine whether Gammick and Helzer are entitled to qualified immunity. *See, e.g., Milstein*, 257 F.3d at 1013 n. 6.

C. County Liability

After finding that Gammick and Helzer were entitled to absolute immunity, the district court dismissed all the defendants, including the County. Generally, a municipality may not be held liable under § 1983 for the torts of its employees. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); *Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 403, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997). The actions of individual employees can support liability against their governmental employer

only if the employees were acting pursuant to an official policy, *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986), or committed a constitutional violation "pursuant to a longstanding practice or custom. . . ." *Webb v. Sloan*, 330 F.3d 1158, 1164 (9th Cir.2003). However, liability may also attach "even for an isolated constitutional violation . . . when the person causing the violation has final policymaking authority." *Id.* Final policy-making authority may be granted by a state legislature or by officials who possess that authority. *Pembaur*, 475 U.S. at 483, 106 S.Ct. 1292.

The parties seem to agree that Gammick, the County District Attorney, has final policymaking authority. They disagree, however, about whether the district attorney is a policymaker for the state or the County. We determine whether an officer is a state or a county official by looking to state law to determine whether the particular acts the official is alleged to have committed fall within the range of the official's state or county functions. *Weiner v. San Diego County*, 210 F.3d 1025, 1028-29 (9th Cir.2000) (discussing *McMillian v. Monroe County*, 520 U.S. 781, 785-86, 117 S.Ct. 1734, 138 L.Ed.2d 1 (1997)).

Botello argues that Gammick, as district attorney, was a Washoe County employee and policymaker when he acted "outside the scope of active criminal prosecutions and outside the scope of prosecutorial discretion" and "specifically adopted a policy of retaliation against plaintiff for his speech and ratified all acts of Helzer." In contrast, the County claims that under Nevada law, when Gammick made the decision not to prosecute cases initiated by Botello, he was acting as a policymaker on behalf of the state and not the County.

The County's argument is unavailing in two respects. First, it is foreclosed by our holding in *Webb v. Sloan* that, under Nevada law, "principal district attorneys are final policymakers for the municipality with respect to the conduct of criminal prosecutions." *Webb*, 330 F.3d at 1165. Accordingly, Gammick was a policymaker for the County when he decided not to prosecute Botello's cases.

Second, Botello alleges that other than adopting the nonprosecution policy, Gammick's conduct was administrative, not judicial, in nature. The County offers no argument to rebut the proposition that a district attorney acting in his administrative and investigative capacity is a County policy-maker. Instead, the County argues that all of Gammick's conduct in relation to Botello can be characterized as falling within the district attorney's prosecutorial function. As discussed above, we reject this argument. Other than the decision not to prosecute Botello's cases, Gammick's other conduct as a County policymaker-telephoning the School Police Department to dissuade it from hiring Botello and insisting that he be barred from all stages of the investigative process—were not closely related to the judicial process. *Cf. Weiner*, 210 F.3d at 1030-31 (holding that under California law a district attorney acts as a county officer for some administrative purposes and a state officer when deciding whether to prosecute an individual). Because Gammick was acting as a policy-maker for the County when he performed the administrative acts outside the scope of absolute immunity, we reverse the district court's dismissal of Botello's claims against the County.

Appendix A

III. Conclusion

For the foregoing reasons, the district court's dismissal is AFFIRMED as to Gammick's and Helzer's decision not to prosecute Botello's cases. The district court's dismissal is REVERSED and the case is REMANDED as to Gammick's and Helzer's communications to the School Police Department in an effort to dissuade it from hiring Botello, their communications demanding that Botello be barred from any stage of the investigative process and the County's liability. Costs on appeal are awarded to appellant Botello.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA DATED JULY 30, 2003 AND ENTERED AUGUST 5, 2003

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Case No.: CV-N-03-0195-RLH (VPC)

(Motion to Dismiss–#22)

RENE BOTELLO,

Plaintiff,

vs.

RICHARD GAMMICK, JOHN HELZER, and WASHOE COUNTY,

Defendants.

ORDER

Before the Court is Defendants' **Motion to Dismiss First Amended Complaint** (#22), filed June 10, 2003. The Court has also considered Plaintiffs Opposition (#24), filed June 30, 2003, and Defendants' Reply (#28), filed July 14, 2003.

BACKGROUND

In December 2001, Plaintiff was a child sexual assault investigator for the Washoe County Sheriffs Office. Plaintiff became suspicious that a nurse was making "gross" medical errors in her assessments of alleged child sex abuse victims. He brought his concerns to the Washoe County District

Attorney's Office, the Attorney General, and the FBI, among others. Plaintiff believes that as a result of his actions, the Defendants, both District Attorneys for Washoe County, have been attempting to harm his career, defame him, and intentionally inflict emotional distress upon Plaintiff

Defendant prosecutors have informed Plaintiffs employers that they will no longer "accept for prosecution any case in which Detective Botello is a witness." *Ex.* 8. As a result, Plaintiff may no longer be able to fulfill his duties as a Detective. He has currently been assigned to a temporary desk job.

Plaintiff has alleged that Defendants have said to Plaintiff's employer and others that Plaintiff is an unreliable witness and "not a team player." As a result of the emotional distress Plaintiff has been experiencing, he has developed irritable bowel syndrome. Plaintiff seeks injunctive relief and compensatory damages.

Plaintiff has one cause of action under federal law, a first amendment claim for Defendants' allegedly chilling his right to free speech, brought under § 1983. Under supplemental jurisdiction, Plaintiff asserts two Nevada State Law claims, one for defamation, the other for the intentional infliction of emotional distress. Defendants have moved to dismiss under the doctrine of absolute immunity for prosecutors.

Appendix B

DISCUSSION

Absolute Immunity for Prosecutors:

Absolute immunity exists for prosecutors under § 1983 for their actions that are "intimately associated with the judicial phase of the criminal process." *Burns v. Reed*, 500 U.S. 478, 486, 111 S.Ct. 1934, 1939, 114 L.Ed.2d 547 (1991) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 431, 96 S.Ct. 984, 995, 47 L.Ed.2d 128 (1976))(internal citations omitted). A prosecutor has absolute immunity for the decision of whether or not to prosecute. *Burns*, *500* U.S. at 486, 111 S.Ct. at 1939. "[C]onsistent with our sister circuits, we hold that a prosecutor is entitled to absolute immunity for the decision not to prosecute." *Roe v. City and County of San Francisco*, 109 F.3d 578, 583 (9th Cir. 1997).

"A prosecutor's professional evaluation of a witness is entitled to absolute immunity even if that judgment is harsh, unfair, or clouded by personal animus." *Id* at 584. "Intent should play no role in the immunity analysis." *Ashelman v. Pope*, 793 F.2d 1072, 1078 (9th Cir. 1986) (en banc); *see also McCarthy v. Mayo*, 827 F.2d 1310, 1315 (9th Cir. 1987)("The intent of the prosecutor when performing prosecutorial acts plays no role in the immunity inquiry.").

Plaintiff Botello alleges that Defendants have refused to prosecute any cases on which Botello might work (and thus be called to testify about) in retaliation for Plaintiffs exercise of his first amendment right to free speech. Even if this were true, the Court finds that the alleged statements are protected as the prosecutor's professional evaluation of Botello as a potential witness. Plaintiffs § 1983 claim will be dismissed.

Appendix B

Failure to State a Claim for Which Relief Can be Granted:

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides that a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see also Yamaguchi v. U.S. Dept. of the Air Force*, 109 F.3d 1475, 1481 (9th Cir. 1997). All factual allegations set forth in the complaint "are taken as true and construed in the light most favorable to [p]laintiffs." *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1999). Dismissal is appropriate "only if it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *see also McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988).

Taking all factual allegations set forth in the complaint as true and construed in the light most favorable to the Plaintiff, the Defendants enjoy absolute immunity from the federal claim. Because the Defendants are immune to suit under federal law, and federal courts are courts of limited subject matter jurisdiction, the supplemental state law claims are dismissed without prejudice pursuant to 28 U.S.C. § 1367.

Appendix B

CONCLUSION

Accordingly, and for good cause appearing,

IT IS HEREBY ORDERED that DEFENDANTS' Motion to Dismiss (#22) is GRANTED.

Dated: July 30, 2003.

s/ Roger L. Hunt
ROGER L. HUNT
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING FILED AUGUST 3, 2005

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-16618

D.C. No. CV-03-00195-RLH/VPC

RENE BOTELLO,

Plaintiff - Appellant,

v.

RICHARD GAMMICK; JOHN HELZER; WASHOE COUNTY,

Defendants - Appellees.

ORDER

BEFORE: NOONAN, THOMAS and FISHER, Circuit Judges.

Judges Thomas and Fisher voted to deny appellees' petition for rehearing en banc, and Judge Noonan recommended denying the petition for rehearing en banc.

Appendix C

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en bane. Fed. R. App. P. 35.

The petition for rehearing en banc, filed July 6, 2005, is **DENIED.**

APPENDIX D — RELEVANT NEVADA LAW

Nev. Const., Art. 6, § 13:

Sec: 13. **Style of process.** The style of all process shall be "The State of Nevada" and all prosecutions shall be conducted in the name and by the authority of the same.

NRS 169.055:

NRS 169.055 "Criminal action" defined. "Criminal action" means the proceedings by which a party charged with a public offense is accused and brought to trial and punishment. A criminal action is prosecuted in the name of the State of Nevada, as plaintiff.

NRS 173.045:

NRS 173.045 District attorney or Attorney General to be informant; endorsement of names of witnesses; affidavits.

1. All informations must be filed in the court having jurisdiction of the offenses specified therein, by the attorney general when acting pursuant to a specific statute or by the district attorney of the proper county as informant, and his name must be subscribed thereto by him or by his deputy.

2. The district attorney or the attorney general shall endorse thereon the names of such witnesses

as are known to him at the time of filing the information. He shall not endorse the name of any witness whom he does not reasonably expect to call.

3. In all cases in which the defendant has not had or waived a preliminary examination there must be filed with the information the affidavit of some credible person verifying the information upon the personal knowledge of affiant that the offense was committed.

NRS 252.110:

NRS 252.110. Duties. The district attorney shall:

1. Draw all indictments, when required by the grand jury.

2. Defend all suits brought against his county.

3. Prosecute all recognizances forfeited in the district court and all actions for the recovery of debts, fines, penalties and forfeitures accruing to his county.

4. Except with respect to matters for which the board of trustees of the school district has employed private counsel, draw all legal papers, give his written opinion when required on matters relating to the duties of the board of trustees and

transact the legal business of the school district whose boundaries are conterminous with the boundaries of his county, and perform such other legal duties as may be required of him by the board of trustees.

5. Bring all actions on behalf of the county for abatement of nuisances pursuant to order of the board of county commissioners or, in the discretion of the district attorney, pursuant to an ordinance of the county as provided by NRS 244.360, subsection 6, including actions for injunction, as well as for recovery of compensatory and exemplary damages and costs of suit.

6. Perform such other duties as may be required of him by law.

Appendix D

Assembly Bill No. 477—
Committee on Government Affairs

CHAPTER . . . . . .

AN ACT relating to public officers; revising provisions relating to the authority of deputies appointed by certain public officers; and providing other matters property relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

* * *

Sec. 6. NRS 252.070 is hereby amended to read as follows:

252.070 1. All district attorneys ~~[are authorized to]~~ *may* appoint deputies, who ~~[may]~~ *are authorized to* transact all official business relating to *those duties of* the ~~[offices]~~ *office set forth in NRS 252.080 and 252.090* to the same extent as their principals ~~[.]~~ *and perform such other duties as the district attorney may from time to time direct. The appointment of a deputy district attorney must not be construed to confer upon that deputy policymaking authority for the office of the district attorney or the county by which the deputy district attorney is employed.*

* * * *

SUPREME COURT, U.S.
FILED
JAN 5 - 2006
OFFICE OF THE CLERK

No. 05-583

IN THE

Supreme Court of the United States

RICHARD GAMMICK, JOHN HELZER
and WASHOE COUNTY,

Petitioners,

v.

RENE BOTELLO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Petition raises the following issues:

(1) Did the appellate panel properly rule that prosecutors Gammick and Helzer were not protected by absolute immunity for their conduct in interfering with whistleblower officer Botello's employment and barring his employer from allowing him to participate in any aspect of criminal investigations at any stage—even before any prosecutions were contemplated?

(2) Did the appellate panel properly apply the well-established, traditional approach to the function analysis by focusing on the prosecutors' conduct and its ties to the judicial process and not the damage caused by their various conduct?

(3) Did the appellate panel properly look to Nevada law, as interpreted by the federal appellate court, to find that a Nevada district attorney acts as a policymaker for the county when making administrative as well as prosecutorial decisions?

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STATEMENT OF THE CASE

The Court of Appeals for the Ninth Circuit accurately summarized the allegations related to respondent Rene Botello's claim [Pet'r App. 2a-5a]. Briefly stated, Botello—a highly regarded and unusually ethical police officer with an impeccable record—alleged in his First Amended Complaint that two Washoe County prosecutors, District Attorney Richard Gammick and chief deputy John Helzer, retaliated against him after he questioned the competence of a frequently utilized nurse expert witness who works closely with the District Attorney's office and has a history of helping it garner juvenile sexual assault convictions.

Armed with expert physician medical proof that the nurse was incompetently reaching false medical conclusions that could result in erroneous convictions, Botello spoke out urging physician oversight for her testimony as well as an audit of criminal investigations she participated in. Threatened in turn by Botello's speaking out, Gammick and Helzer launched personal attacks on his character to his employer in their successful effort to interfere with his employment and have him fired [FAC, ER 88-90]:

First, while Botello was between jobs with no cases or investigations pending, Gammick and Helzer telephoned his new employer, the Washoe County School District, in an effort to dissuade it from hiring him, making allegations they knew to be false about his character and job performance.

Second, Gammick and Helzer adopted a non-prosecution policy under which they would refuse to call Botello as a witness or to prosecute any cases he investigated and they communicated their new policy to Botello's employer.

Third, Gammick and Helzer insisted that Botello's employer not permit him to participate in any phase of any investigation, no matter how preliminary his involvement, no matter whether any prosecution was contemplated, and no matter whether other investigators were available to testify or corroborate any initial investigative work Botello might perform. Gammick and Helzer brought forth no allegations of misconduct by Botello or examples of past performance to justify their extreme position. They simply gave his employer an ultimatum: Botello was not to be allowed near any criminal investigations—no matter how remote from a judicial proceeding—because the mere whiff of his participation in any aspect of any investigation would allegedly "taint" the process and cause Gammick and Helzer to dismiss any case that might later develop. This ultimatum had the practical effect of rendering Botello useless to his employer, who assigned him to a desk job and later reduced his pay by half [FAC, ER 90-91].[1]

Botello brought a civil rights lawsuit alleging whistleblower retaliation. The district court dismissed the case based on absolute immunity, which the appellate panel affirmed in part and reversed in part. Affirming in part, the panel found the prosecutors' adoption of a non-prosecution policy and the communication of that policy were protected by absolute immunity. No matter the prosecutors' motive, even if it were unlawful retaliation for protected

1. Amicus Curiae City of Sparks asserts that Botello "made absolutely no allegation that the acts of Gammick or Helzer either caused the loss of his job or any other constitutionally protected interest." To the contrary, Botello alleged that, in addition to other harms, Gammick and Helzer's interference with his employment caused him to be reassigned to desk duty and later terminated, then offered another position at half pay [*See* Pet'r App. 5a & 5a, n. 3].

whistleblower speech, the panel found such conduct to be intimately tied to the judicial function and therefore absolutely protected.

Simultaneously reversing in part, the panel determined that the prosecutors' other conduct—the defamatory calls to Botello's employer and the barring of Botello from all aspects of the investigative process including the earliest stages of preliminary investigations—were not intimately tied to the judicial process. In both instances, the panel found, Gammick and Helzer "sought to usurp" the employer's administrative decisions including whom to hire and how to staff future criminal investigations [Pet'r App. 12a-13a].

Petitioner's brief requesting certiorari is deceptive because it addresses all of the prosecutors' various conduct as though it were part and parcel of their singular decision not to prosecute Botello's cases. Petitioner's brief mistakenly assumes that all actions by a prosecutor are in some way related to the judicial process and so are protected by absolute immunity. It ignores that Gammick and Helzer engaged in much other conduct extraneous to their refusal to prosecute Botello's cases and with no connection to the judicial process, and it disregards the Supreme Court's rigorous application of the functional analysis to prosecutors' actions.

REASONS FOR DENYING THE PETITION

I.

THE APPELLATE PANEL DID NOT CONSIDER THE PROSECUTORS' MOTIVE WHEN APPLYING THE FUNCTIONAL APPROACH TO THE QUESTION OF ABSOLUTE IMMUNITY

The Supreme Court has been "quite sparing" in recognizing absolute immunity in context of § 1983. *Buckley v. Fitzsimmons*, 509 U.S. 259, 269, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993) (citing *Forrester v. White*, 484 U.S. 219, 224, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988)). This is because the Civil Rights Act, 42 U.S.C. § 1983, provides no defense of official immunity. However, certain immunities were so well established in 1871 when § 1983 was enacted that the Supreme Court "presume[s] that Congress would have specifically so provided had it wished to abolish" them. *Id.* at 268 (citations omitted). The Supreme Court further recognizes that prosecutors perform "special functions" warranting absolute protection from damages liability where they are similar to functions that would have been immune when Congress enacted § 1983. *Id.* at 268-69; *see also Imbler v. Pachtman*, 424 U.S. 409, 430, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976).

Accordingly, in cases brought under § 1983, the Supreme Court has adopted a rule of absolute immunity for conduct of prosecutors that is "intimately associated with the judicial phase of the criminal process." *Buckley*, 509 U.S. at 270. Under this rule, a prosecutor is absolutely immune for his conduct "in initiating a prosecution and in presenting the State's case." *Id.*

However, neither the prosecutor's administrative duties nor those investigatory functions that do not relate to an advocate's preparation for initiating a prosecution or for judicial proceedings are entitled to absolute immunity. *Id.* at 273 (citing *Burns v. Reed*, 500 U.S. 478, 494-96, 111 S. Ct. 1934, 114 L. Ed. 2d 547 (1991)). "[W]hen a prosecutor functions as an administrator rather than as an officer of the court, he is entitled only to qualified immunity." *Id.* (citing *Imbler*, 424 U.S. at 431, n. 33 (1976)).

To perform its functional analysis, the Court "focuses on the *conduct* for which immunity is claimed, not on the *harm* that the conduct may have caused or the question whether it was lawful." *Id.* at 271 (emphasis added). If a prosecutor has not carried his burden of establishing that he was functioning as an "advocate" when he engaged in the conduct at issue, the inquiry is at an end and absolute immunity is not available. *See id.* at 273, 278.

Petitioners assert that, in applying the well-established traditional functional approach, the appellate panel "necessarily and improperly looked to the motives of Gammick and Helzer" [Pet'r Br. 6]. In support, petitioners cite to references in the panel's decision to Botello's allegations of "retaliation" [Pet'r Br. 7].

Petitioner's position is nonsense. In referencing Botello's allegations of employment "retaliation," the panel simply acknowledged the substantive allegations driving Botello's whistleblower retaliation case. The panel matter-of-factly characterized the allegations made. It did not base its findings on allegations of retaliation but rather looked to the prosecutors' conduct underlying those allegations. Thus, it

is of no significance that the panel mentioned Botello's complaint of retaliation.

What matters is *how* the panel analyzed the prosecutors' functions when engaged in their various retaliatory conduct. To analyze the prosecutors' functions, the panel properly looked to the three types of conduct alleged: first, Gammick and Helzer's defamatory phone calls to Botello's employer with no prosecution pending or contemplated; second, their adoption of a non-prosecution policy and communication of that policy to Botello's employer; and third, their barring of Botello from all stages and aspects of all future investigations, even the earliest stages of preliminary investigations.

In the portion of the decision that petitioners do not challenge, the panel found that the second category of conduct, the prosecutors' refusal to prosecute Botello's cases, was protected by absolute immunity. So finding, the panel noted that prosecutors have been found to have absolute immunity for the decision to prosecute a particular case as well as the decision not to prosecute a particular case or group of cases [Pet'r App. 8a (citing *Burns*, 500 U.S. at 486 and *Roe v. City & County of San Francisco*, 109 F.3d 578, 583 (9th Cir. 1997)]. Implicit in this finding is deference to the long-established rule *not* to look at a prosecutor's motive for actions within the confines of a particular judicial proceeding no matter how improper or whether driven by personal animus.

> Like witnesses, prosecutors and other lawyers were absolutely immune from damages liability at common law for making false or defamatory statements in judicial proceedings (at least so long as the statements were related to the proceeding),

> and also for eliciting false and defamatory testimony from witnesses.

Burns, 500 U.S. at 489-90; *see also Bradley v. Fisher*, 13 Wall. 335, 351, 20 L. Ed. 646 (1872) (re judges). The panel further emphasized how "a prosecutor's professional evaluation of a witness is entitled to absolute immunity 'even if that judgment is harsh, unfair or clouded by personal animus'" [Pet'r App. 8a (citing *Roe*, 109 F.3d at 584)].

Thus, explicitly *disregarding* the prosecutors' retaliatory motive, the panel properly applied the Supreme Court's well-established function test to find absolute immunity for one category of Gammick and Helzer's retaliatory conduct, their refusal to prosecute Botello's cases and communication of that decision to his employer.

Applying the same analysis to the two other categories of conduct by Gammick and Helzer, the panel found that qualified, and not absolute, immunity protected them, first, when they defamed Botello to his employer outside the context of any actual or contemplated judicial proceedings and, second, when they interfered with his employer's personnel decisions regarding how it would employ Botello in future investigations.

Although the panel focused on the administrative function, it also noted that "by attempting to dictate the manner in which future investigations should be staffed and conducted, the prosecutors were likely also engaging in an investigative rather than a judicial function." [Pet'r App. 9a, n. 5 (citing *Buckley*, 509 U.S. at 273)].